IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ATACS CORPORATION and AIRTACS CORPORATION	:	CIVIL ACTION
v.	:	
TRANS WORLD COMMUNICATIONS, INC.	:	NO. 92-5064

O'Neill, J. May , 2000

MEMORANDUM

Plaintiffs ATACS Corp. and AIRTACS Corp. filed suit against defendant Trans World Communications, Inc. on August 31, 1992 alleging claims for breach of contract, detrimental reliance, fraudulent misrepresentation, wrongful interference with prospective contractual relations, unjust enrichment and punitive damages. By Order dated April 26, 1996, I granted summary judgment to defendant on plaintiffs' claims for fraudulent misrepresentation and punitive damages. Following a bench trial of the remaining claims, I issued a Memorandum and Order on May 28, 1997 ("ATACS I") in which I held that plaintiffs had proven by a preponderance of the evidence that the parties had entered into a teaming agreement in early 1990 to work together to obtain a contract to manufacture communication shelters for the Hellenic Army General Staff (HAGS) and that defendant had breached that agreement by awarding applicable subcontracts to other companies after winning the HAGS contract. However, I also held that plaintiffs had failed to establish either lost profits or lost opportunity damages with reasonable certainty. Accordingly, I requested that the

parties submit supplemental findings of fact and conclusions of law on alternative measures of damages.

By Memorandum and Order dated September 3, 1997 ("ATACS II"), I held that though plaintiffs had contributed valuable services to defendant they had not provided sufficient evidence to support an award of restitution damages. I also held that disgorgement of profits was not a proper remedy for breach of the teaming agreement since there was no support for such a remedy under Pennsylvania law absent the breach of a fiduciary duty, and because the value of the benefit to defendant from plaintiffs' actions fell far short of defendant's profits as the prime contractor. As a result I awarded nominal damages of $1.

Plaintiffs appealed the damages issue to the U.S. Court of Appeals for the Third Circuit. Defendant then cross-appealed the issue of whether a teaming agreement had in fact been reached by the parties and breached. In an Opinion dated September 8, 1998 ("ATACS III"), the Court of Appeals affirmed the judgment except for the award of nominal damages. Finding the denial of restitution damages without an evidentiary hearing to be premature, the Court of Appeals remanded the issue to this Court.

On August 23, 1999, I held an evidentiary hearing on this issue at which the parties presented evidence in support of their respective positions. Post-hearing briefing was completed January 18, 2000. The following will constitute findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

I.

In Pennsylvania, as in most jurisdictions, a party injured by another's breach need only prove

damages with reasonable certainty. See Scobell, Inc. v. Schade, 688 A.2d 715, 719 (Pa. Super. Ct. 1997). "At a minimum, reasonable certainty embraces a rough calculation that is not 'too speculative, vague or contingent' upon some unknown factor." ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669 (3d Cir. 1998), quoting Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866 (Pa. 1988).

Where, as here, a party's expectation interest –that is, its interest in having the benefit of the bargain –has not been proven with reasonable certainty, contract law provides alternate remedies under the theories of reliance and restitution. Reliance damages seek to place an injured party in the position it would have obtained had the contract never been made, usually through recovery of expenditures made either in performance or in anticipation of performance. ATACS, 155 F.3d at 669 (citations omitted). Restitution damages, on the other hand, seek to promote traditional notions of equity by requiring the party in breach "to disgorge the benefit received by returning it to the party who conferred it." Id.

Plaintiffs have never claimed reliance damages in this court and did not attempt to raise that issue on appeal. ATACS, 155 F.3d at 670. The sole issue before me then is the appropriate measure of plaintiffs' restitution interest.

II.

Plaintiffs seek an award of restitution damages totaling $4,187,736, plus prejudgment

interest.[1] This sum represents a considerable escalation of the alleged lost profits which plaintiffs sought at the first trial and which I found to be speculative. At that trial plaintiffs' expert witness Dr. Samuel J. Kursh testified that plaintiffs' lost profits resulting from defendant's breach were approximately $2,346,000. Trial Tr. at 3-5. In other words, plaintiffs now ask this Court to find that the value of the benefit conferred to defendant was nearly twice plaintiffs' alleged lost profits.

Included in plaintiffs' current damages figure is a request for disgorgement of additional profits totaling $1,887,104 which defendant allegedly earned as a result of its breach. However, I have already held that disgorgement of profits is not an appropriate remedy in this case and the Court of Appeals has affirmed. I will therefore consider only the second component of plaintiffs' requested award –the valuation of the benefit received by defendant as a result of plaintiffs' participation in the bid proposal at 10% of the final HAGS contract price, or $2,300,632.

Defendant contends that plaintiffs are attempting to reprise their claim for lost profits, albeit clothed in different terms, and have again failed to prove damages with reasonable certainty. According to defendant, plaintiffs' restitution damages should be measured by their bid and proposal

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[1] "For over a century it has been the law of this Commonwealth that the right to interest upon money owing upon contract is a legal right. That right to interest begins at the time payment is withheld after it has been the duty of the debtor to make such payment." Spang & Co. v. USX Corp., 599 A.2d 978, 984 (Pa. Super. 1991), quoting Fernandez v. Levin, 548 A.2d 1191, 1193 (Pa. 1988) (citations omitted). Such interest is calculated as simple interest and is levied at the statutory rate, which is six percent, see 41 Pa. C.S.A. § 202; Spang & Co., 599 A.2d at 984.

In a restitution action, however, the trial court "has discretion to award damages in the nature of prejudgment interest in an amount greater than six percent." Peterson v. Crown Financial Corp., 661 F.2d 287, 292-93 (3d Cir. 1981). The court may do so by awarding compound interest rather than the simple interest allowable by statute in contract actions. Id. at 297; Sack v. Feinman, 413 A.2d 1059, 1065 (Pa. 1980). Some courts characterize an award of prejudgment interest in a restitution action as delay damages. Id. at 293-94.

Here, plaintiffs seek an award of six percent compound interest on damages of $4,187,736, or $2,958,106.76. Pl.'s Proposed Findings of Fact and Conclusions of Law at 18.

costs.

III.

After consideration of the evidence presented, I find that plaintiffs have failed to establish their requested damages with reasonable certainty. Despite my prior holdings, which were affirmed on appeal, that plaintiffs cannot recover expectation damages, it seems apparent that plaintiffs have taken their original request for lost profits and simply restated it as restitution. Not only do plaintiffs ascribe a dollar figure to the benefit conferred upon defendant by their participation in the bid proposal equal to that previously claimed as lost profits, they offer no credible justification for arriving at such a figure.

Plaintiffs' valuation of the benefit conferred is based solely on the testimony of their expert witness Dale Church. At the evidentiary hearing Church testified that fees for services comparable to those provided by plaintiffs can range from 1% to 15% of a final bid price. Hearing Tr. at 120-21. He believed that a 10% commission was fair and reasonable based on both plaintiffs' experience and reputation, id. at 12-25, and on their exclusive agency relationship with Axon, a Greek firm with ties to HAGS, which plaintiffs "turned over" to defendant. Id. at 138-39. According to Church, this relationship "was a very golden one that created an almost unprecedented opportunity." Id. at 138.

I do not credit Church's testimony for a number of reasons. First, plaintiffs had apparently never entered into any written, exclusive agency agreement with Axon. Though Fred Barakat testified that he had executed an exclusive agency agreement with Axon, id. at 34, he later admitted that he "might of just initialed something" and that "he just didn't know." Id. at 64-65. Whatever he had allegedly executed, he did not possess a copy and had never told plaintiffs about it. Id. at 65-

66. In addition, he stated that he "did not feel it would pass muster under U.S. laws." Id. at 66. Such testimony is clearly insufficient to establish that plaintiffs enjoyed an exclusive relationship with Axon.[2] Thus, a major premise for Church's valuation is flawed. Though plaintiffs provided a valuable benefit by introducing Axon to defendant, they neither transferred nor waived any exclusive right to Axon's services. Whatever the value of that introduction might be, it falls short of turning over or surrendering an exclusive agency relationship.

Even more troubling, Church stated that he had not reviewed plaintiffs' communications with defendant, id. at 127, nor the technical assistance provided by plaintiffs, id. at 128, 132, nor the bid proposals received from competing subcontractors, id. at 147-48, nor the technical requirements in the final contract between defendant and HAGS. Id. at 149-50. Though Church often made reference to the value of plaintiffs' services, he does not identify what those services were, other than "hand[ing] off a lucrative and wonderful opportunity." Id. at 142. When asked on cross-examination to identify what services plaintiffs provided other than 'handing over the opportunity,' he failed to elaborate. Id. at 147. As I noted in ATACS II, "[w]hile it is clear that [plaintiffs] provided highly specialized, valuable consulting services, it is not clear how to quantify the value of those services." ATACS II, at 2. Church's testimony simply does not aid the fact finder in

[2] Church testified that his belief that plaintiffs possessed an exclusive agency relationship with Axon was based on his reading of the record. Hearing Tr. at 139-40. Though plaintiffs are correct that I have characterized Axon as plaintiffs' agent in prior opinions, I never addressed the issue of whether they enjoyed an exclusive relationship with Axon which was later transferred to defendant.

determining this issue.[3]

Finally, at least a partial basis for Church's valuation of plaintiffs' damages appears to be the lost profits originally alleged by plaintiffs. In his expert report Church states that "[i]t would be less than fair if ATACS did not receive at least the $2,000,000 in profits they would have received from their subcontract." Church Report at 8. This apparent confusion of plaintiffs' expectation interest with their restitution interest casts further doubt upon the expert's testimony. For all of these reasons, I find the expert opinion testimony of Dale Church to be too speculative to support the requested award of damages.

Though plaintiffs rejected the use of bid and proposal costs as a measure of their restitution interest and presented no evidence on the issue, defendant's expert witness William Zimmerman testified that such costs represented the value of plaintiffs' contributions. Hearing Tr. at 173-74. Based on this testimony, defendant's proposed findings of fact assign a value of $18,900 to plaintiffs' restitution interest. Accordingly, I will award damages in that amount plus prejudgment interest, at a compounded rate of 6%. Since I lack the necessary information to calculate the amount of prejudgment interest due, I ask to parties to determine that amount, consistent with this opinion, and to submit a final damages figure to the Court. I will then enter final judgment.

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[3] The Court of Appeals suggested that in determining damages I could consider how much of the $2,000,000 in savings defendant allegedly realized from selecting alternate subcontractors reflected preliminary work done by plaintiffs. However, neither Church's testimony nor any other evidence presented by plaintiffs sheds light on this issue. As noted above, Church did not review the preliminary work done by plaintiffs, the other subcontractor's bid proposals, or the technical requirements in the final contract.

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O R D E R

AND NOW this day of May, 2000, it is hereby ORDERED that judgment is entered in favor of plaintiffs and against defendant in the amount of $18,900, plus an amount of prejudgment interest to be determined by the parties consistent with this opinion.

If necessary, the parties may request that the Court issue a final Order awarding prejudgment interest to plaintiffs in the amount determined by parties.

THOMAS N. O'NEILL, JR., J.